

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A SUBSTANTIAL  
DEVELOPMENT PERMIT ISSUED BY  
SKAGIT COUNTY TO MARINE CONSTRUCTION  
AND DREDGING (SKAGIT DEVELOPERS, INC.)  
STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY AND  
SLADE GORTON, ATTORNEY GENERAL,

Appellants,

v.

SKAGIT COUNTY AND MARINE  
CONSTRUCTION AND DREDGING  
(SKAGIT DEVELOPERS, INC.),

Respondents.

SHB No. 244

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, a request for review of the issuance by Skagit County of a substantial development permit to Marine Construction and Dredging, Inc. came before the Shorelines Hearings Board, W. A. Gissberg, presiding, Robert F. Hintz, William A. Johnson, and Chris Smith, on March 30 and 31, and April 1, 1977 in Mount Vernon, Washington.

Appellant appeared by and through its attorney, Robert E. Mack,

1 Assistant Attorney General; respondent, Marine Construction and Dredging,  
2 Inc., appeared through its attorney, Stanley K. Bruhn; respondent,  
3 Skagit County, appeared through William H. Nielsen, Chief Deputy  
4 Prosecuting Attorney.

5 Having heard the testimony, having examined the exhibits, and the  
6 Board having served its proposed Findings of Fact, Conclusions of Law and  
7 Order upon the parties, and having received exceptions to its proposed  
8 decision from appellants and respondents, said exceptions being granted  
9 in part and denied in part, the Shorelines Hearings Board makes the  
10 following

11 FINDINGS OF FACT

12 I

13 Respondent Marine Construction and Dredging, Inc. (hereafter MCD),  
14 the permittee in this matter, has its offices located in Mount Vernon and  
15 its dock in LaConner. MCD operates primarily in Skagit County but has  
16 operated at other places in Washington and Oregon. Seventy percent of  
17 MCD's work is dredging and other water-related work. Over one-half of  
18 MCD's work has been for the U. S. Army Corps of Engineers. MCD also does  
19 pile driving, land clearing and heavy construction. Some work is  
20 performed for farmers and forest product firms. MCD is primarily a  
21 water-dependent business and must be located on the shoreline in order  
22 to carry on its dredging and pile driving activities.

23 II

24 MCD leases its present location and has been searching for a site  
25 to purchase which would meet its needs and requirements for a pro-  
26 tected harbor in Skagit County, with approximately four upland acres for

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1 storage and maintenance of its equipment and with access to roads and  
2 railroads. MCD's present LaConner facility is located in a Historical  
3 Preservation District. The trend in LaConner toward the recognition of  
4 its historic and recreational potential may come into conflict with some  
5 of the industrial uses in the area and force the Company's relocation.  
6 It's operations are incompatible with the surrounding town and marina.  
7 Moreover, MCD's continued occupancy of its LaConner site is, at best,  
8 tenuous. In addition, no land storage is available which is needed for  
9 working on its floats and pipes. MCD desires to consolidate its offices,  
10 now located in Mount Vernon, and its water-dependent operations at one  
11 suitable site.

### 12 III

13 After a thorough three-year long search in Skagit County, MCD  
14 selected the site in question. The 11-acre triangular-shaped site is  
15 located on the east bank of the Swinomish Channel approximately 400 feet  
16 from Padilla Bay, and is bounded to the north by a Burlington Northern  
17 railroad track and a bridge and to the south by State Highway 20. A  
18 light industrial park, created by the Swinomish Indians from fill, and  
19 the Western Lime Company lie to the west of the site, across the  
20 Swinomish Channel. The Western Lime Company's operation has permission  
21 to relocate east of the channel to the immediate north of the railroad  
22 tracks. Other than the present site, no suitable space is available to  
23 MCD elsewhere in the County, including the Indian reservation across  
24 the channel.

25 At least a portion of the site is located within wetlands of the  
26 shoreline. It is not located within "natural wetlands" as the term is

1 used in the master program because the water table was not shown to be  
2 within two feet of the average surface grade on a periodic or a  
3 seasonal basis. Master Program, Section 3.03.83.

#### 4 IV

5 On October 5, 1976, MCD received approval for a permit to make  
6 the following generally described substantial developments: dredging  
7 to ten feet below mean lower low water (MLLW) of a 340 foot by 260 foot  
8 harbor in the Swinomish Channel; placing of the dredged spoils on the  
9 north half of the site to form a plateau at about 17 feet above MLLW;  
10 using the southeasterly two-thirds of the property as a future disposal  
11 site for Corps dredging from the Swinomish Channel; construction  
12 of a 60 foot by 15 foot fixed dock and a 130 foot by 10 foot floating  
13 dock with four dolphins; certain land facilities, including a 24 foot  
14 by 40 foot office and shop building, a radio antenna, roads and a  
15 parking area. Fuel for land operated equipment will be stored on the  
16 site and fuel for marine equipment will be stored on a fueling barge.  
17 There will be no transfer of fuel from land to water. Substantial  
18 developments ultimately planned but not scheduled for construction nor  
19 included within the instant permit include a 100 foot by 40 foot repair  
20 and storage shed, a railroad siding, and an expanded gravel surface for  
21 access. The proposed development is an industrial use within the meaning  
22 of the Skagit County Master Program.

#### 23 V

24 MCD's operation at the site will be low in intensity, consisting  
25 of mooring of small shallow draft barges and dredging equipment, storage  
26 space and offices, with low traffic generation. In contrast, Western

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1 Lime's adjacent operation, lime crushing, is a seasonal intermittently  
2 high intensity use. A shoreline permit was granted to Western Lime to  
3 relocate north of the site, but that permit was not appealed by the  
4 appellants herein because, among other things, the lime plant was  
5 considered an agricultural-related industry.

#### 6 VI

7 Three and one-half acres of the site were contractually zoned  
8 industrial. The remainder of the site, about seven acres, remains  
9 zoned agricultural. The seven acres are impressed with a contract  
10 condition that no development is to proceed thereon without further  
11 action by the County. The Skagit County Master Program places the entire  
12 site in a rural area designation.

#### 13 VII

14 As the initial step in construction, MCD will remove about 40,000  
15 cubic yards of spoil from the 340 foot by 260 foot harbor area. Dredging  
16 can be timed to avoid interfering with salmon migration and bird  
17 nesting. The material dredged will be deposited on about three and  
18 one-half acres of the site. Maintenance dredging of the created harbor  
19 area would be less frequent than the two year maintenance dredging of  
20 the Swinomish Channel. The remainder of the site will be available  
21 for dredged spoils from the U. S. Army Corps of Engineers' maintenance  
22 dredging of the Swinomish Channel. Revegetation of the spoils will  
23 occur as soon as possible to reduce erosion.

#### 24 VIII

25 The instant site is termed an "old field" habitat, meaning that it  
26 was at one time farmed acreage. The habitat provides nesting and

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1 breeding cover for 31 species of birds and small mammals. There are no  
2 unusual species of mammals at the site.

3 The placing of spoils on the site would destroy existing wildlife  
4 habitats. The spoils, being high in salt content and low in fertility,  
5 would be poor wildlife habitats, and further, would preclude future  
6 agricultural use of the site.

## 7 IX

8 The Department of Ecology has not determined any specific line  
9 designating the location of the shoreline of state-wide significance  
10 across the mouth of the Swinomish Channel where it joins Padilla Bay.  
11 It has, however, picked the Burlington Northern Railway trestle which  
12 crosses the mouth of the channel as the management line approximating  
13 the location of the shoreline of state-wide significance.

14 Over the 20 or so years of deposits of dredged spoils at the mouth  
15 of the Swinomish Channel, the shoreline of Padilla Bay has been  
16 extended seaward. The site is located more than 200 feet from the  
17 shoreline of Padilla Bay as that shoreline existed on June 1, 1971.

18 Extreme low tide at the site is 4.5 feet below MLLW. MCD proposes  
19 to dredge a harbor to a depth of 10 feet below MLLW, some portion of  
20 which is seaward of the low tide.

## 21 X

22 The site is not an estuary as the term is used in the County's  
23 master program or DOE guidelines.

## 24 XI

25 Padilla Bay, lying immediately north of the Swinomish Channel, is  
26 a unique, productive and valuable wildlife area. It is termed an

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1 "area of particular concern" in the state's Coastal Zone Management  
2 Program. Its importance stems primarily from large beds of eel grass  
3 and other organisms connected with it. The eel grass, which covers  
4 10,600 acres of the 14,500 acres in Padilla Bay, is the largest single  
5 eel grass area in Puget Sound. The Bay and its eel grass provide a  
6 rest area and food for waterfowl which includes some 16 species of  
7 ducks. The ducks also feed on lands adjacent to the Bay, especially  
8 in areas where they are not hunted.

9 XII

10 It is not known whether eel grass exists in the Swinomish Channel,  
11 but even if it could, the Corps of Engineers' channel dredging destroys  
12 any such growth biennially. Because of past and ongoing activities,  
13 the shoreline of the site is not a natural one.

14 XIII

15 The site is presently regarded as a buffer zone to the shores and  
16 waters of Padilla Bay. However, the construction of the Western Lime  
17 plant north of the site diminishes the effectiveness of the site as a  
18 buffer zone.

19 XIV

20 The proposed development will add pollution stress to Padilla Bay  
21 although such can be mitigated by intercepting pollutants. While it  
22 may not be possible to identify substantial environmental harm from this  
23 proposal to the waters and shores of Padilla Bay, the cumulative effect  
24 of many such developments would, at some unknown time in the future,  
25 change the entire ecosystem. Unfortunately, it is not possible to  
26 predict, until too late, at what point development will destroy the

1 existing environment by virtue of its cumulative impact.

2 XV

3 It is not economically feasible to use the 11-acre site for  
4 privately owned agricultural purposes because it is not suitable  
5 therefor because of the poor productivity of the soil and the low  
6 economic return.

7 XVI

8 The adverse visual impact created by the MCD's storage and maintenanc  
9 activities is minimal in view of the Western Lime plant, the nearby  
10 industrial park area, and the existing structures.

11 XVII

12 Approval of the entire project could establish a precedent for  
13 development on or near Padilla Bay. Approximately three and one-half  
14 acres of farmland would be converted to a low intensity industrial  
15 use. The remaining seven acres of fill would be irretrievably  
16 committed to an unidentified non-agricultural use. Such commitment  
17 would encourage non-agricultural uses on the adjacent property. The  
18 proposal is simply a non-agricultural operation seeking to locate  
19 within a generally agricultural setting. The project as proposed  
20 constitutes piecemealing and provides a greater likelihood that the  
21 development would set an undesirable precedent. The County, however,  
22 contends that the precedential effect of the proposal is limited because  
23 the project is contained within the boundaries of the railroad tracks,  
24 the state highway, and the Swinomish Channel. Although we might agree  
25 with the County, further restrictions upon the project are necessary to  
26 insure the protection of the shorelines affected.

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Of primary importance is the establishment of a buffer zone around the proposed industrial use in order to prevent industrial encroachment into agricultural areas. This buffer can be provided by leaving the seven acre portion of the property in its present condition. Only in this manner can this project be allowed on the subject shorelines without subjecting the surrounding farmland to the pressures of adjacent industrial uses. Stated in another fashion, this proposed industrial use must isolate itself from the surrounding rural and agricultural settings in order to locate on the instant shoreline.

## XVIII

The Skagit County Master Program was adopted by the County on June 29, 1976 and approved by the Department of Ecology on October 5, 1976.

The word "should" as used in the master program means that which is "recommended but not absolutely required." Section 3.02.2. The word "shall" means mandatory. Section 3.02.1.

The master program provides that a rural shoreline area is typified by low structural density and low to moderate intensity of uses. A rural designation is intended for the protection of prime agricultural land, regulation of development along undeveloped shorelines, and to provide a buffer for compatible uses. The management policies specifically provide that

(6) Developments of an industrial, commercial (except farm related sales and commercial forestry) and extensive residential development should be prohibited.

(7) Rural Shoreline Areas should be managed in a manner so as not to preclude future agricultural uses. Section 6.04.3.d.

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1 Because of the adjacent uses on the shoreline and past activities on  
2 the site, the shoreline area is not undeveloped. The site itself is  
3 not prime agricultural land although it provides a buffer to nearby  
4 agricultural land. (See Finding of Fact XV.) In view of the foregoing  
5 provisions, we find the 11-acre proposed development inconsistent with  
6 the master program in that the 7-acre spoils disposal site, for which  
7 there is no identified ultimate use, would not protect the adjacent  
8 agricultural land. See also Section 7.04.2.B(5). Although the foregoing  
9 provisions admonish against industrial use of the shoreline in a manner  
10 which precludes future agricultural use, it does not absolutely prohibit  
11 MCD's storage and maintenance activities on the three and one-half acre  
12 portion of the site. We find that with proper precautions, such  
13 activities can be a low-intensity, compatible use of the shoreland which  
14 is consistent with the master program.

15 A part of the proposed development would occur in the aquatic  
16 shoreline area designation in the master program. Although such provision  
17 recommends that developments which consume land and resources be  
18 located in appropriate existing use areas, we find that the site is  
19 the only appropriate site for MCD's storage and maintenance activities  
20 in Skagit County. The provisions also discourage the use of bottom  
21 material for landfill. (Section 6.04.6.d(10) states only that bottom  
22 material "should" not be used for landfill. See Section 3.02.) However,  
23 the U. S. Army Corps of Engineers must periodically dredge the channel  
24 and remove the bottom material to maintain navigation. We can find no  
25 inconsistency of the proposed development with the aquatic shoreline  
26 designation area of the master program.

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1 The master program discourages dredging in estuaries, natural  
2 wetlands and marshes. It also prohibits the placement of spoils on  
3 estuaries and natural wetlands. Additionally, spoils disposal areas must  
4 be identified:

5 Dredge spoil disposal is permitted in designated spoils  
6 disposal areas within the Rural Shoreline Area. Disposal  
7 areas shall be identified by the department until such  
8 time they are identified in the Master Program.  
9 Section 7.04.2.A(3)(2).

10 Spoil disposal sites - Dredge spoil disposal shall occur  
11 at sites consistent with this Master Program and the  
12 Shoreline Management Act. Proposals for spoil disposal  
13 must show that ultimate use of the site will be for a  
14 use permitted within the Shoreline Area. Section 7.04.2.B(5).

15 Skagit County has not designated dredging spoils disposal areas in its  
16 master program. Under such circumstances, such areas "shall" be  
17 identified by the Department of Ecology (hereafter DOE). DOE, in effect,  
18 approves sites on an ad hoc basis by reviewing individual substantial  
19 development permits. It has not approved the 7-acre portion of the site  
20 as a disposal area, nor are there plans for it to do so. The Corps of  
21 Engineers has deposited dredged spoils on several privately owned  
22 properties lying southerly of the site and adjacent to the natural wet-  
23 lands of the Swinomish Channel for which properties substantial develop-  
24 ment permits were issued by the County and reviewed by DOE with no appeals  
25 taken thereto.

26 Finally, the ultimate use of the 7-acre site is not identified  
27 as the provisions require although such acreage would be irreversibly  
28 removed from future agricultural use. For the foregoing reasons, we  
29 find the proposed development inconsistent with the master program.

30  
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XIX

In a rural environment designation, the master program allows piers and wharves, such as the proposed fixed and floating docks, as a conditional use. Section 7.10.2.A(3)b. In addition, where a use is not permitted under the general provisions of the master program, it can nonetheless be considered as a conditional use.

The County determined that the applicant's proposal met the more stringent requirements demanded of conditional uses by Section 11.03:

Permits for conditional uses shall be granted only when all the following criteria are met: the burden of proof shall be on the applicant:

- a. The proposed use or development must meet applicable regulations and/or performance standards contained in this program that will assure compatibility with other uses permitted in the specific Shoreline Area; and
- b. The use or development will not cause unreasonably adverse impacts on shoreline features or environmental quality; and
- c. The use or development will not unnecessarily nor substantially interfere with lawful public use of public shorelines; and
- d. Visual appearance of the development will be compatible with adjoining shoreline features and intent of the site's Shoreline Area designation; and
- e. The development will be consistent with the general intent of this program.

The evidence and our findings support the determination of the County except as to the 7-acre upland spoils disposal location which is inconsistent with Section 11.03.

XX

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Shorelines Hearings Board makes these

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CONCLUSIONS OF LAW

I

The Board has jurisdiction over the persons and over the subject matter of this proceeding.

II

The instant permit is judged by the policy of RCW 90.58.020, the DOE guidelines and the master program so far as it can be ascertained.

III

The 11-acre proposed substantial development is inconsistent with the policy of RCW 90.58.020 in that the landfill consisting of dredge spoils on the easterly 7-acre portion of the site represents a non-water dependent use and an uncoordinated and piecemeal planning and development of the shoreline. Neither the 11-acre site nor the 7-acre portion thereof has been designated by DOE as a dredge spoils disposal site, although this fact in itself is not fatal to certain portions of the proposed development. There is a lack of an identifiable ultimate use of the 7-acre disposal site when completed and a lack of meaningful control over such portion of the site either now or in the future. See Master Program Section 7.04.2.B(5). Because this undesirable result is caused by the permit in question, the permit is rendered inconsistent with the Shoreline Management Act. It is not designed and constructed in a manner to minimize, insofar as practical, any resultant damage to the shoreline area. RCW 90.58.020.

IV

In determining whether the site lies on a shoreline of state-wide significance, it is necessary to determine where Padilla Bay ends and

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1 the Swinomish Channel begins. Since the twenty-year old dredge spoils  
2 have extended the mouth of the Swinomish Channel northerly into what  
3 was once Padilla Bay, we conclude that the site is not within 200 feet  
4 of the Bay. However, subsequent to June 1, 1971, what were then part of  
5 shorelines of state-wide significance cannot be changed artificially.  
6 Stated in another fashion, under the Shoreline Management Act, only  
7 nature can make such a change. RCW 90.58.030(2)(b).

8 A portion of the substantial development is proposed to occur  
9 in shorelines of state-wide significance, however. Dredging and  
10 construction is planned in "[t]hose areas of Puget Sound . . . and  
11 adjacent salt waters . . . lying seaward from the line of extreme low  
12 tide . . . ." RCW 90.58.030(e)(iii). As such, certain preferences  
13 in uses on the subject shoreline are applicable:

- 14 (1) Recognize and protect the state-wide interest over  
15 local interest;
- 16 (2) Preserve the natural character of the shoreline;
- 17 (3) Result in long-term over short-term benefit;
- 18 (4) Protect the resources and ecology of the shoreline;
- 19 (5) Increase public access to publicly owned areas of  
20 the shoreline;
- 21 (6) Increase recreational opportunities for the public in  
22 the shoreline . . . . RCW 90.58.020.

23 The proposed development, which is not on a natural, i.e., unintruded  
24 shoreline, is inconsistent with the foregoing in that local piecemeal  
25 planning is evident which pursues a singular local interest and an  
26 irreversible use with a short term benefit. Moreover, the proposed  
27 development does not plan for the protection of the nearby resources  
and ecology of the shorelines, but is notably silent as to any  
protective conditions such as effluent collection and disposal.

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V

The proposed development, without conditions which would ensure the maintenance and preservation of the water quality, is inconsistent with WAC 173-16-040(6)(i), 173-16-040(5)(c)(i), 173-16-050(5) and 173-060(14)(a). The proposed development, except as noted, is otherwise consistent with the DOE guidelines.

VI

The proposed development has not been shown to be inconsistent with the provisions of the master program except as previously noted.

VII

The permit should be remanded to Skagit County to strike all provisions allowing the placement of dredge spoils on the 7-acre upland site, and to add conditions to the permit which would ensure the inclusion and preservation of the 7-acre upland site as a buffer zone to the proposed industrial use allowing its continued function as a wildlife habitat, which would require dredging to be timed to avoid interfering with salmon migration, and which would prevent pollutants, such as fuel oil, from reaching the surface and ground waters of the state. With these changes, the permit would become consistent with the policy of RCW 90.58.020, the DOE guidelines, and the master program.

VIII

Respondent MCD's remaining contentions are without merit.

IX

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board enters this

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ORDER

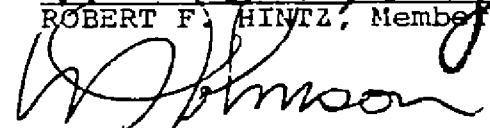
The shoreline substantial development permit issued to Marine Construction and Dredging, Inc. by Skagit County is remanded for reissuance in accordance with Conclusion of Law VII.

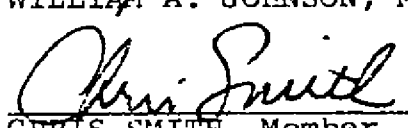
DATED this 20<sup>th</sup> day of July, 1977.

SHORELINES HEARINGS BOARD

  
W. A. GISSBERG, Chairman

  
ROBERT F. HINTZ, Member

  
WILLIAM A. JOHNSON, Member

  
CHRIS SMITH, Member

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